

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREEDOM FROM RELIGION) Docket No. A 16-CA-233 SS
FOUNDATION, INC.)
)
vs.) Austin, Texas
)
GOVERNOR GREG ABBOTT,)
CHAIRMAN OF THE STATE)
PRESERVATION BOARD, ET AL) June 20, 2016

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SAM SPARKS

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25 Proceedings reported by computerized stenography, transcript produced by computer.

14:04:28 1 THE COURT: Okay. The Court calls 16-CA-233, Freedom
14:04:34 2 From Religion Foundation, Incorporated vs. Greg Abbott, Governor,
14:04:39 3 et cetera.

14:04:39 4 I'll take announcements.

14:04:44 5 MR. ROBERTS: Dale Roberts with Fritz, Byrne, Head &
14:04:48 6 Fitzpatrick on behalf of plaintiff, along with Richard Bolton.

14:04:53 7 THE COURT: All right.

14:04:56 8 MS. MACKIN: Ann Marie Mackin with the Texas Office of
14:04:58 9 Attorney General on behalf of the Defendants Governor Greg Abbott
14:05:02 10 and Executive Director of the State Preservation Board John
14:05:05 11 Sneed. With me is Angela Colmenero, also with our office.

14:05:11 12 MR. ASTON: Adam Aston with the governor's office.

14:05:13 13 THE COURT: Welcome, all of you.

14:05:17 14 We're here on the defendants' motion to dismiss
14:05:19 15 primarily. So, Ms. Mackin.

14:05:27 16 MS. MACKIN: Afternoon, your Honor.

14:05:29 17 This case is about displays in the Texas state capitol.
14:05:33 18 These displays are submitted by private parties. They must be
14:05:38 19 sponsored by either the governor, lieutenant governor, the
14:05:42 20 speaker of the house, a state senator, or --

14:05:44 21 THE COURT: And this one was, so let's go on to
14:05:47 22 something I haven't read.

14:05:48 23 MS. MACKIN: Sure, your Honor.

14:05:51 24 Well, the plaintiff bases the entire case on the
14:05:55 25 assumption that these displays on the Texas capitol are purely

14:05:59 1 private speech. This is case dispositive in this instance and
14:06:04 2 this contention is incorrect.

14:06:05 3 THE COURT: Would it be private speech if somebody was
14:06:08 4 handing it out on the capitol grounds to people coming, crossing
14:06:12 5 Congress?

14:06:12 6 MS. MACKIN: Certainly. However, in the context of the
14:06:16 7 two areas that are set aside for display in the capitol for
14:06:21 8 exhibits with a public purpose, these limited resources have been
14:06:27 9 taken by the state, and under the Administrative Code, it's
14:06:32 10 specified that the sovereign power of the state is extended to
14:06:36 11 promote a public purpose within these two specific areas within
14:06:41 12 the capitol.

14:06:42 13 So these areas are not -- they're not open to the
14:06:46 14 public for any type of display that an exhibitor wishes to put
14:06:53 15 forward.

14:06:53 16 THE COURT: Well, didn't you expressly consent to that
14:06:59 17 and allow the display to be put up for a public purpose in the
14:07:06 18 same policy that the plaintiff agreed to and that the
14:07:11 19 preservation board agreed to it?

14:07:14 20 MS. MACKIN: Well, your Honor, the exhibit at issue
14:07:17 21 here --

14:07:17 22 THE COURT: Yes?

14:07:19 23 MS. MACKIN: Yes.

14:07:19 24 THE COURT: Okay.

14:07:20 25 MS. MACKIN: Yes. It was permitted to go on to display

14:07:22 1 in the Texas capitol.

14:07:25 2 THE COURT: For just four days.

14:07:26 3 MS. MACKIN: I believe that's right. Yes.

14:07:28 4 THE COURT: This lawsuit's here because of four days.

14:07:31 5 Two days passed and two days didn't. Sometimes I think how you

14:07:41 6 can mix up to get such a lawsuit, the expenditure of public

14:07:52 7 funds, the expenditure of private funds.

14:07:56 8 All right. So we have an application duly made.

14:08:02 9 Everybody knows the rules. The preservation board gives consent.

14:08:10 10 They come down, they set up their display, and the governor

14:08:19 11 didn't like it and unilaterally orders it down. Now pick up your

14:08:26 12 argument.

14:08:27 13 MS. MACKIN: Well, your Honor, the governor, first of all, functions as chairman of the State Preservation Board.

14:08:32 15 THE COURT: I understand that. But I notice that he

14:08:34 16 wrote the letter to the preservation board as the governor.

14:08:40 17 MS. MACKIN: Yes, your Honor. He also mentioned,

14:08:42 18 however, that he was writing as chairman of the State

14:08:46 19 Preservation Board and he --

14:08:48 20 THE COURT: He didn't say he was the board, did he?

14:08:52 21 MS. MACKIN: No.

14:08:52 22 THE COURT: He said he was the executive. By law, he

14:08:58 23 is the executive of the board. Did he just come out of the

14:09:02 24 meeting with the board and decide, well, we all agree that has to

14:09:08 25 be taken down, it's not for public purpose?

14:09:11 1 MS. MACKIN: Well, your Honor, what I think is --

14:09:12 2 THE COURT: Is that a "No"?

14:09:14 3 MS. MACKIN: No.

14:09:17 4 But what I think is important here is the fact that

14:09:25 5 because these exhibits are subject to the government speech

14:09:30 6 analysis as it was articulated in *Summum* and in *Walker*, there is

14:09:34 7 no --

14:09:34 8 THE COURT: It wasn't in *Walker*. In *Walker* -- I'm

14:09:36 9 familiar with *Walker*.

14:09:38 10 MS. MACKIN: Yes, your Honor.

14:09:38 11 THE COURT: In *Walker*, the state had two hearings of

14:09:43 12 which they took public intake and people testified, and they

14:09:49 13 determined that the issuing of those plates would not be a good

14:09:57 14 public function because it would be government speech. So that

14:10:05 15 wasn't any issuance of that. It's another -- at least that has

14:10:14 16 some materiality rather than 48 hours. So it's not like *Walker*.

14:10:21 17 MS. MACKIN: Well, *Walker* is instructive insofar as the

14:10:25 18 way it applies the factors in assessing whether or not expressive

14:10:30 19 conduct is evaluated either as purely private speech or under the

14:10:35 20 government speech analysis. And so --

14:10:38 21 THE COURT: We can agree that the display is private

14:10:40 22 speech outside the floor of the capitol.

14:10:46 23 MS. MACKIN: Sure.

14:10:46 24 THE COURT: So it changes when it comes into the

14:10:51 25 capitol?

14:10:52 1 MS. MACKIN: In this case, it does, yes, because of the
14:10:57 2 three factors articulated in Summum and, also, in Walker albeit
14:11:02 3 in a different factual --

14:11:03 4 THE COURT: Notwithstanding the consent and authority
14:11:05 5 of the state?

14:11:07 6 MS. MACKIN: Sure. But the state -- to the extent that
14:11:10 7 the state enjoys its own First Amendment right when speaking for
14:11:13 8 itself, it similarly enjoys the right to change that expressive
14:11:19 9 conduct.

14:11:20 10 THE COURT: Well, the policy allows you to take it down
14:11:22 11 at any time. Well, let me rephrase that. Allows the board to
14:11:29 12 take it down.

14:11:30 13 MS. MACKIN: And that policy is not put at issue in
14:11:33 14 this case.

14:11:33 15 THE COURT: Well, indirectly it is. There wouldn't be
14:11:37 16 any lawsuit if it wasn't. If they could take it down at any time
14:11:43 17 and they agree with it, it's like in the professional basketball,
14:11:50 18 no harm, no foul.

14:11:54 19 What is the difference -- is there a difference between
14:11:59 20 a board looking at an application and determining it qualifies,
14:12:07 21 it has a public purpose and allowing them up for four days, just
14:12:12 22 four days, and then, the governor without a board meeting says,
14:12:21 23 take it down, it's --

14:12:25 24 MS. MACKIN: Well, there may be a difference in
14:12:27 25 procedure, but there is not a legally dispositive difference in

14:12:32 1 this case. I think it would almost be akin to, for example, a --
14:12:38 2 the Court often hears motions for injunctive relief, and at that
14:12:43 3 stage, you determine whether or not something is going to go on
14:12:45 4 for a little while or be stopped. And that decision, as the
14:12:50 5 injunction proceeding continues, it can ultimately reach a
14:12:54 6 different result on whether the conduct at issue is allowed or
14:12:58 7 not.

14:12:58 8 THE COURT: Yes. That's true. And injunctions have to
14:13:01 9 do with contracts. And the state also takes the position that
14:13:07 10 there was a contract involved and that the contractual terms are
14:13:17 11 indemnity, although it's from the third party, which doesn't seem
14:13:21 12 to be applicable here, and it seems to be that -- of course, they
14:13:34 13 could take it down at all times. They could take it down. They,
14:13:40 14 the board, could take it down.

14:13:45 15 Let's attack it a different way. We agree that it's
14:13:51 16 private constitutional speech out the window and on the grounds.

14:13:56 17 MS. MACKIN: Yes.

14:13:56 18 THE COURT: So --

14:13:58 19 MS. MACKIN: Well, on someone's front yard, yes. On
14:14:04 20 the grounds of the state capitol.

14:14:06 21 THE COURT: Right.

14:14:06 22 MS. MACKIN: There's a little --

14:14:07 23 THE COURT: Where the public is crossing the street at
14:14:10 24 Congress and these folks have this picture and they hand out --
14:14:18 25 do you take the position the state would stop them on the

14:14:22 1 sidewalks going up to the capitol?

14:14:24 2 MS. MACKIN: No. Certainly not.

14:14:26 3 THE COURT: Of course not.

14:14:28 4 MS. MACKIN: Okay.

14:14:29 5 THE COURT: But you -- but the governor can.

14:14:37 6 MS. MACKIN: Well, this is a vastly different

14:14:40 7 situation. I mean, this is speech that is installed in a limited

14:14:46 8 -- limited areas, two exhibit areas in the capitol that is

14:14:49 9 subject to approval by an elected official, that is subject under

14:14:56 10 the agreement to use the government property to install the

14:15:00 11 display.

14:15:00 12 THE COURT: All of which was when they installed in

14:15:06 13 order, representative made the approval. The board, the

14:15:15 14 correspondence, they accepted the policy and they built their

14:15:23 15 nativity. Bad choice of words for the season, an intentional

14:15:31 16 choice of words, unfortunate choice of words, makes for a

14:15:38 17 lawsuit. I'm not saying anybody's got clean hands here.

14:15:46 18 But what troubles me is without notice, you close the

14:15:53 19 exhibit that you approved two days earlier because the governor

14:16:00 20 doesn't like it and says close it.

14:16:04 21 MS. MACKIN: Well, if this were private speech, no one

14:16:07 22 could do that and no one can test that. If this were private

14:16:11 23 speech on my front lawn, if I put up a yard sign that said, vote

14:16:17 24 for whomever.

14:16:19 25 THE COURT: So tell me, when did it become private

14:16:25 1 speech again?

14:16:26 2 MS. MACKIN: It's not.

14:16:29 3 THE COURT: So it's not government speech.

14:16:31 4 MS. MACKIN: It is government speech.

14:16:33 5 THE COURT: How possibly could it be?

14:16:35 6 MS. MACKIN: It is government speech because --

14:16:37 7 THE COURT: Did you read my opinion and the Supreme

14:16:41 8 Court opinion in Wallace?

14:16:43 9 MS. MACKIN: Yes.

14:16:43 10 THE COURT: How could it possibly be government's?

14:16:46 11 MS. MACKIN: Well, the three factor -- so the first

14:16:47 12 factor history is one only needs to walk through the halls in the

14:16:53 13 Texas capitol to see displays that the architect of the capitol

14:16:58 14 and the preservation board install in the capitol, and these are

14:17:01 15 generally talking about state history, renovations to the

14:17:06 16 capitol, government programs, government speech. And so,

14:17:14 17 understandably, because the halls of the Texas capitol are not

14:17:17 18 open to all comers, you can't just go into the capitol and

14:17:23 19 install --

14:17:24 20 THE COURT: Oh, I have that in the gun cases. Let's

14:17:28 21 don't get too much into this.

14:17:31 22 MS. MACKIN: Sure.

14:17:32 23 THE COURT: When did it become government speech?

14:17:35 24 MS. MACKIN: It became government speech the moment

14:17:37 25 that the foundation sought to place it in the exhibit space

14:17:43 1 within the Texas capitol.

14:17:48 2 THE COURT: So everything that's posted in the capitol
14:17:54 3 becomes government speech?

14:17:56 4 MS. MACKIN: Not always. Not everything. But in this
14:18:00 5 context where not only do you have a --

14:18:04 6 THE COURT: Where is the magic? Where is the light
14:18:08 7 that changed this to government speech? Not for a moment did I
14:18:12 8 think it was government speech. It is in that in-between area.
14:18:18 9 It's their private speech. Is it a constitutional right? Let's
14:18:23 10 start with that. That's how I'm going to start with them.

14:18:28 11 MS. MACKIN: Private speech is a constitutional right.
14:18:30 12 Most certainly. But the standard for unfettered exercise of that
14:18:36 13 is when it is purely private speech on private property. And
14:18:41 14 then we have this continuum that goes from traditional public
14:18:44 15 forums to designated to limited to nonpublic to government
14:18:48 16 speech.

14:18:52 17 THE COURT: I have a little trouble with that. Of
14:18:54 18 course, there's always the middle ground where you have trouble
14:18:57 19 with it. But when it goes from constitutional protected speech
14:19:10 20 to not protected at all because you go through a wall, it's the
14:19:19 21 same speech. It's either constitutional or it isn't. Let's look
14:19:23 22 at it this way. What if the board had refused to give authority
14:19:31 23 to the plaintiff to put it up and they filed the lawsuit? What
14:19:36 24 kind of speech would you call that now?

14:19:39 25 MS. MACKIN: Well, it never became government speech

14:19:41 1 because it was never adopted for display in the capitol.

14:19:46 2 THE COURT: It was a constitutional right, you say?

14:19:48 3 MS. MACKIN: But private individuals do not have a
14:19:50 4 constitutional right to direct the -- to direct the messages that
14:19:55 5 the government chooses to associate itself with.

14:19:59 6 THE COURT: Well, that's a pretty conclusive right,
14:20:01 7 isn't it? So everything that the government doesn't choose that
14:20:07 8 is right is not government speech, and everything that the
14:20:17 9 government chooses to be government speech is government speech?
14:20:20 10 We wouldn't need all those opinions all over the circuit and the
14:20:24 11 Supreme Court trying to determine which is which, would we? And
14:20:28 12 giving me a headache when I've got 390 really lawsuits.

14:20:32 13 MS. MACKIN: Well, I think that that emphasizes the
14:20:34 14 fact that these are very context-specific determinations.

14:20:42 15 THE COURT: And one person makes the determination.

14:20:47 16 Okay. Let me hear from the plaintiff.

14:20:57 17 MR. BOLTON: Good afternoon, your Honor.

14:20:59 18 Obviously, well, from the briefing that's been done and
14:21:06 19 from the discussion that your Honor has had already with counsel,
14:21:12 20 the premise of the defendants' position here is basically a
14:21:16 21 repudiation of the public forum doctrine altogether. Their
14:21:22 22 position implicitly is that any time the government goes to
14:21:26 23 any --

14:21:27 24 THE COURT: Let's talk about yours. Let's don't talk
14:21:30 25 about their rights. Let's talk about yours.

14:21:33 1 You were granted the authority to put up your thing for
14:21:40 2 four days subject to it being withdrawn. The capitol
14:21:50 3 preservation board had an absolute right under the authority that
14:21:55 4 you got your permission to to stop it at any time. So why are we
14:22:00 5 here?

14:22:02 6 MR. BOLTON: That authority, though, does not take
14:22:04 7 precedence over the First Amendment. So certainly --

14:22:09 8 THE COURT: Well, it becomes -- the state says it's at
14:22:15 9 that time because you're there, it's now government speech.

14:22:23 10 That's what the state said.

14:22:25 11 MR. BOLTON: Well, I agree it's not government speech.
14:22:29 12 The notion -- I mean, the premises of that argument, then, is
14:22:34 13 that at any time that we decide either before or after, since
14:22:41 14 we're dealing with a situation after where it had already been
14:22:45 15 allowed, the argument that we can withdraw that permission at any
14:22:50 16 time based on viewpoint, I think --

14:22:54 17 THE COURT: There are no -- I read it two or three
14:22:57 18 times. There are no conditions. There's no thing about
14:22:59 19 viewpoint. Don't like it, didn't like the color. I don't like
14:23:03 20 where they put it, I don't like a lot of things. You put it
14:23:07 21 there with the knowledge they could take it away, didn't you?

14:23:12 22 MR. BOLTON: The --

14:23:15 23 THE COURT: Answer. Is that a "Yes"?

14:23:17 24 MR. BOLTON: Pardon?

14:23:18 25 THE COURT: Is that a "Yes"?

14:23:19 1 MR. BOLTON: I don't believe it is a "Yes." It's not a
14:23:21 2 "Yes" in the sense that the permission can be withdrawn in
14:23:30 3 violation of the establishment clause because --

14:23:31 4 THE COURT: All right. Let's take it another way. You
14:23:36 5 make your application, they turn you down.

14:23:43 6 MR. BOLTON: Yes, your Honor.

14:23:45 7 THE COURT: They say, you know, it's Christmas. Have a
14:23:49 8 lot of people celebrating Christmas. You come in December the
14:23:53 9 22nd, you want to put this display out. We think it's
14:23:59 10 inappropriate at this time, bingo, no. You come over here, say,
14:24:08 11 I've got constitutional protected speech and they won't put it
14:24:13 12 out in a public forum that's for all the people. Are you going
14:24:18 13 to win that?

14:24:19 14 MR. BOLTON: In a public forum, obviously reasonable
14:24:23 15 time, space and manner limitations are appropriate, but even in
14:24:27 16 that situation, they cannot be either on their face or as
14:24:33 17 applied, applied in a content or a viewpoint discriminatory
14:24:39 18 fashion.

14:24:41 19 So I don't think there's any question here that this
14:24:43 20 sort of permitting or licensing that's at issue here, number one,
14:24:49 21 it does not --

14:24:50 22 THE COURT: Well, it is. That's how you got in.

14:24:53 23 MR. BOLTON: I'm sorry?

14:24:54 24 THE COURT: That's how you got in.

14:24:55 25 MR. BOLTON: I understand. But that was how they got

14:24:58 1 in in Pinette, also, in the Supreme Court position. It is -- the
14:25:01 2 fact of having that sort of licensing or permitting process does
14:25:05 3 not foreclose the creation of a public forum.

14:25:12 4 THE COURT: Can anybody with constitutionally protected
14:25:18 5 speech demand to put something on the floor of the capitol?

14:25:27 6 MR. BOLTON: It depends on --

14:25:28 7 THE COURT: "Yes" or "No"?

14:25:30 8 MR. BOLTON: Pardon me?

14:25:31 9 THE COURT: "Yes" or "No"?

14:25:33 10 MR. BOLTON: I can't answer that question "Yes" or
14:25:36 11 "No."

14:25:36 12 THE COURT: We should return to Aryan Brotherhood and
14:25:43 13 here is a great statue of a white supremacist and we want it on
14:25:50 14 the tundra of the capitol.

14:25:56 15 MR. BOLTON: Well, that's the Pinette case, your Honor,
14:26:00 16 and in that case, the Supreme Court said that the answer was that
14:26:04 17 it needed to be permitted. And in Pinette, they specifically --

14:26:09 18 THE COURT: So you don't need permission at all. You
14:26:12 19 just --

14:26:13 20 MR. BOLTON: Yes, they did, your Honor. They had --

14:26:16 21 THE COURT: No, no. I'm talking about you.

14:26:17 22 MR. BOLTON: Oh, I'm sorry.

14:26:18 23 THE COURT: About Freedom From Religion Foundation, you
14:26:21 24 could have just gone on there and put your thing up.

14:26:26 25 MR. BOLTON: Again, the answer to that would be -- I

14:26:29 1 actually think the answer is yes as that space was being utilized
14:26:38 2 in this case. The question of whether they had to at least get
14:26:41 3 permission or not depends on whether or not it's a traditional
14:26:44 4 public forum, a dedicated public forum, or a limited public
14:26:48 5 forum. And all three of those prohibit viewpoint discrimination.
14:26:55 6 But in the case of a dedicated public forum.

14:26:58 7 THE COURT: Well, you know, are you telling me that you
14:27:03 8 think the rotunda is a dedicated public forum? The only thing
14:27:07 9 I've ever seen in it in 76 years -- and I go through it
14:27:12 10 frequently -- is governors' pictures. They're on the wall there.

14:27:17 11 MR. BOLTON: Well, the reason I would say in this case
14:27:19 12 that that space that we're talking about could be construed as a
14:27:23 13 dedicated public forum is because at least as it was being -- the
14:27:31 14 policy and practices of the preservation board, they were not
14:27:35 15 regulating either the discrete subject matter or the speakers
14:27:40 16 that could display there. And generally if you've opened up a
14:27:46 17 space to the public and you have not specified that it's going to
14:27:50 18 be limited to, you know, this agenda or that but it's --

14:27:55 19 THE COURT: That's why I ruled years ago, Erwin Center
14:27:58 20 was a public forum, not the university's. I understand that.

14:28:01 21 MR. BOLTON: So whether or not FFRF, the Freedom From
14:28:06 22 Religion Foundation needed to at least go through, you know, the
14:28:10 23 application process depends on whether or not it's a dedicated or
14:28:14 24 limited public forum.

14:28:16 25 At a minimum, it's a limited public forum in which case

14:28:20 1 they would have to go through the process, but that process and
14:28:24 2 the procedures still needs to be content-neutral, even with a
14:28:29 3 limited public forum. And the fact that you have to go through a
14:28:33 4 process to regulate time, space and manner does not foreclose
14:28:39 5 that from being a public forum; otherwise, the very nature of a
14:28:44 6 public forum would become inconsistent with it being a public
14:28:50 7 forum.

14:28:50 8 If you say you've limited it to certain subject matter
14:28:54 9 or speakers, or you have to go through a licensing or permit
14:28:57 10 process, if you say that that by definition precludes it from
14:29:04 11 being a limited public forum, those are the things that tend to
14:29:09 12 define a limited public forum.

14:29:12 13 So what the argument would be is that these things that
14:29:16 14 constitute -- define it as a limited public forum actually then
14:29:22 15 disqualify it from being a public forum. And there's nothing in
14:29:25 16 the Supreme Court precedent that would say that, for instance,
14:29:28 17 that Walker somehow effected that transformation of the law that
14:29:36 18 basically any government -- or that any speech on government
14:29:40 19 property where you go through an approval process is, therefore,
14:29:45 20 not private speech. There's nothing in Walker that holds that.

14:29:51 21 In fact, in *Summum*, which they rely upon, and *Pinette*
14:29:56 22 and other cases would suggest that that's exact absolutely not
14:29:59 23 the case, that this is a limited -- at least a limited public
14:30:02 24 forum in which what the governor did here --

14:30:06 25 THE COURT: Well, I don't think there's any question.

14:30:08 1 MR. BOLTON: Pardon me?

14:30:09 2 THE COURT: I said, I don't think there's any question

14:30:10 3 about that. They admit it's either limited or private. I don't

14:30:18 4 see how they're going to establish a capitol space private.

14:30:27 5 So your argument, as I understand it, is the process --

14:30:31 6 you're just good guys and you went through the process. You had

14:30:34 7 a constitutional right to put it up and case over. They didn't

14:30:39 8 have any right to take it down.

14:30:44 9 MR. BOLTON: Certainly the reason that they took it

14:30:45 10 down in this case, they did not -- was not a permissible reason.

14:30:50 11 THE COURT: Well, that will have to be determined later

14:30:52 12 after it's down.

14:30:54 13 MR. BOLTON: But I'll agree with you. That is -- I

14:30:57 14 mean, it's not a complicated position. It's not a complicated

14:31:01 15 case.

14:31:02 16 THE COURT: What about the governor's reasons he says

14:31:07 17 his opinion as governor should have been expounded, I guess, when

14:31:14 18 the board died. Because he's just overruling the board, isn't

14:31:23 19 he?

14:31:27 20 MR. BOLTON: At one level, he's acting as part of the

14:31:30 21 board and he's certainly directing the Defendant Sneed to --

14:31:34 22 THE COURT: Well, the board's already approved for the

14:31:37 23 four days. Okay. The governor is taking two of those days away.

14:31:41 24 He's overruling the board, isn't he?

14:31:43 25 MR. BOLTON: He is.

14:31:44 1 THE COURT: All right.

14:31:45 2 MR. BOLTON: I would refer to him as some cases have

14:31:47 3 referred to as a classic case of the cat's paw. Basically, I

14:31:52 4 mean, he didn't give the directive to the subordinates to go take

14:31:57 5 it down, but it was his paw that directed and accomplished it.

14:32:10 6 THE COURT: He indicated that it was degrading of

14:32:22 7 people's religion under the circumstances. Christmas, they had a

14:32:37 8 -- I don't know if they had one or not. The paper said they had

14:32:41 9 a nativity scene -- traditional Christian nativity scene in 2014.

14:32:47 10 So this was in some sort of response to it, I guess. The word

14:33:00 11 "nativity" is intentional, so why isn't it degrading?

14:33:04 12 MR. BOLTON: Why is it degrading?

14:33:05 13 THE COURT: Yes. Why is it -- intellectual rather than

14:33:10 14 showing a point, why do you pick the word "nativity" in that

14:33:15 15 scene?

14:33:18 16 MR. BOLTON: In the display -- in the other display

14:33:21 17 that was allowed?

14:33:22 18 THE COURT: And taken up.

14:33:24 19 MR. BOLTON: Pardon me?

14:33:25 20 THE COURT: And taken up, yeah. In your display that

14:33:28 21 you put there, you deliberately used the word "nativity." Why

14:33:38 22 wasn't that sarcastic, degrading, as the governor says in his

14:33:42 23 letter, and, therefore, not for a public purpose but for an

14:33:46 24 insulting purpose?

14:33:48 25 MR. BOLTON: Well, I don't believe that that is

14:33:50 1 degrading. I don't think it's disparaging. I think if you look
14:33:56 2 at this display, if anything, it is showing a reverence --
14:34:02 3 comparative reverence for the Bill of Rights.

14:34:06 4 THE COURT: You know, I couldn't agree with you more.
14:34:08 5 I looked at it and wondered what in the world was it till I
14:34:11 6 looked down there and saw the word "nativity." A deliberate word
14:34:17 7 out of context for that very purpose at the time of two of the
14:34:23 8 major religions celebrating their faith.

14:34:31 9 MR. BOLTON: I don't -- I don't find it to be
14:34:37 10 degrading. And this is the -- and this is part of the problem
14:34:42 11 here is that as the governor and the board is applying these,
14:34:45 12 it's entirely subjective as to whether something is --

14:34:49 13 THE COURT: Well, let me ask you this. If a group --
14:34:57 14 I'm not particularly fond of cats. I'm allergic to them. What
14:35:02 15 if let's kill all the cats with sledgehammers wants to put up a
14:35:12 16 sledgehammer to kill the cats, or capture them maybe, something
14:35:20 17 totally degrading has a purpose -- a lot of people think that
14:35:25 18 would probably be good for the public not to have a lot of feral
14:35:31 19 cats around -- can the capitol, a forum of the capitol, can they
14:35:35 20 keep out something that is degrading to religions?

14:35:39 21 MR. BOLTON: Again, it --

14:35:41 22 THE COURT: No, no. That's a "Yes" or "No" question.

14:35:43 23 MR. BOLTON: I think in a public forum, I think the
14:35:46 24 answer is no. And what I would say is this: It comes down to
14:35:50 25 whether or not the specific speech that you're looking at is

14:35:54 1 protected or not. And generally speech that someone might
14:35:58 2 consider sacrilegious, blasphemous, satire, those are protected
14:36:02 3 speech. The Supreme Court has said the type of speech that is
14:36:06 4 not protected would be -- the closest in this case would probably
14:36:11 5 be speech that incites lawlessness or disorder. And certainly
14:36:14 6 there's certainly nothing about this display that incites.

14:36:18 7 THE COURT: Well, that's your opinion. Apparently the
14:36:21 8 governor doesn't hold it.

14:36:23 9 What about the part of the briefing that the state's
14:36:35 10 always been very careful as to what goes on in the rotunda? The
14:36:42 11 implication is, a lot of the things that are requested are turned
14:36:45 12 down. That would make it the public place, maybe a semipublic
14:36:57 13 place because they're reserving a discretion to put it down
14:37:02 14 unless it serves a public purpose. That's their position,
14:37:08 15 anyway.

14:37:09 16 MR. BOLTON: Well.

14:37:10 17 THE COURT: So what in your -- would be something they
14:37:16 18 could turn down? Let's raise another Hitler, they could turn
14:37:23 19 that down, I expect, couldn't you?

14:37:28 20 MR. BOLTON: I think if the standard was applied -- and
14:37:30 21 first of all, I don't believe that they were actually applying it
14:37:37 22 in that manner, but if they were, then I think that the standard
14:37:42 23 that they've articulated to regulate that forum and the Supreme
14:37:49 24 Court in other courts have regularly held that that type of
14:37:53 25 standard would basically give the decisionmaker unfettered

14:37:56 1 discretion. And you cannot have a public forum that is -- in
14:38:01 2 which that level of discretion in which, you know, the personal
14:38:11 3 likes, dislikes, offenses, or preferences can determine what
14:38:18 4 speech is going to go into it.

14:38:20 5 As soon as the content of the speech as the Supreme
14:38:24 6 Court recently held in the Reed decision, when you look to the
14:38:28 7 content of the speech, then you're no longer dealing with
14:38:31 8 viewpoint neutrality.

14:38:33 9 THE COURT: So that rotunda is going to get really
14:38:41 10 crowded, isn't it?

14:38:43 11 MR. BOLTON: Pardon me?

14:38:43 12 THE COURT: Have you ever been to the rotunda of the
14:38:45 13 capitol?

14:38:46 14 MR. BOLTON: Have I been?

14:38:46 15 THE COURT: Yeah.

14:38:47 16 MR. BOLTON: You know what, I apologize, I have not
14:38:48 17 been to the --

14:38:49 18 THE COURT: I figured you had, but that's not
14:38:52 19 important. It's not very big. It's very lovely. The only bad
14:38:56 20 part of it is, there's a crack in the floor where a workman fell
14:38:59 21 when they were rebuilding it. But you can't put much there.
14:39:05 22 It's got four entrances and exits and doesn't hold a lot of
14:39:15 23 people.

14:39:16 24 So what limitation does the state have from if it's a
14:39:22 25 public forum?

14:39:24 1 MR. BOLTON: The state can engage in reasonable time,
14:39:27 2 space and manner regulation as long as that regulation is not
14:39:31 3 governed by viewpoint discrimination.

14:39:33 4 THE COURT: That's in the middle, isn't it?

14:39:35 5 MR. BOLTON: Pardon me?

14:39:36 6 THE COURT: That's in the middle. It's not a complete
14:39:39 7 public forum where everybody can be there. There are
14:39:43 8 limitations.

14:39:45 9 MR. BOLTON: But even the forum in the middle of that
14:39:53 10 spectrum, it cannot be governed by viewpoint discrimination.

14:39:58 11 THE COURT: So anybody can go in there, walk past the
14:40:01 12 guards, walk past the people that work in the capitol, and start
14:40:04 13 giving a speech there.

14:40:10 14 MR. BOLTON: Well, again, it depends on whether or not
14:40:16 15 that space is a limited, in the middle of the spectrum, or
14:40:20 16 whether it's been treated as a tradition.

14:40:22 17 THE COURT: I sort of doubt of it being limited. You
14:40:25 18 believe it's a limited forum, don't you?

14:40:27 19 MR. BOLTON: But we've had exactly that problem and it
14:40:30 20 arises in a lot of state capitols where the question is whether
14:40:36 21 or not -- for instance, in Wisconsin, that issue was very much in
14:40:41 22 the news because basically people who were objecting to
14:40:46 23 legislation were ticketed by the capitol police because the
14:40:54 24 capitol, they had adopted a policy that to make any sort of
14:40:59 25 objection at all, you had to get a permit and they said that --

14:41:02 1 THE COURT: We have the same thing here with the city,
14:41:04 2 but that's not really applicable here.

14:41:10 3 Anything else that you want to say?

14:41:14 4 MR. BOLTON: Say that again, your Honor.

14:41:15 5 THE COURT: Would you like to say anything else?

14:41:19 6 MR. BOLTON: No.

14:41:20 7 THE COURT: Okay.

14:41:21 8 MR. BOLTON: Thank you very much, your Honor. I would
14:41:23 9 make one point.

14:41:24 10 Judge Barbara Crabb from up in the Western District,
14:41:29 11 she swore me in for the bar admission here, and she said who are
14:41:33 12 you going to be in front of, and I said Judge Sparks, and that
14:41:37 13 generated some instant recognition and she said to be sure and
14:41:40 14 send you her best regards.

14:41:42 15 THE COURT: Well, thank you.

14:41:45 16 I do want to hear one argument. It seems to me that
14:41:50 17 one of the things that is easily snatched out of is the dismissal
14:41:57 18 of Sneed on qualified immunity. I think anybody would be
14:42:10 19 unreasonable to defy the governor if I put him in the context of
14:42:17 20 a police officer who's been given an order or city ordinance
14:42:22 21 that's wrong and he acts in compliance with that, I'd be letting
14:42:28 22 him out, you know, in any personal capacity. So you want to
14:42:34 23 argue that point anywhere?

14:42:35 24 MR. BOLTON: You know, the premise of that is that if
14:42:38 25 somebody higher up in the chain of command tells me to do

14:42:42 1 something that violates fully established constitutional rights,
14:42:48 2 that as long as I'm following orders, that I'm shielded, and I
14:42:53 3 don't think that is the premise of qualified immunity. The
14:42:57 4 question is not whether or not I was acting at the direction of
14:43:01 5 someone else, but whether or not I had the -- at least the
14:43:04 6 authority to say no and whether or not the law was fully
14:43:06 7 established that's being raised.

14:43:10 8 THE COURT: Well, I don't know of any law that's going
14:43:12 9 to embrace this situation. Again, I wouldn't have invited y'all
14:43:16 10 here.

14:43:16 11 But I find that he's not acting unreasonably when he is
14:43:23 12 following the head of the committee that he's on, who happens to
14:43:32 13 be the governor and closing the -- I just didn't think that was a
14:43:40 14 real tough issue, and I will be dismissing Mr. Sneed in his
14:43:47 15 personal capacity.

14:43:50 16 MR. BOLTON: Anything further from me, your Honor?

14:43:52 17 THE COURT: No. You're doing fine. Thanks. I like
14:43:54 18 your tie, by the way.

14:43:56 19 MR. BOLTON: Thank you very much.

14:44:02 20 THE COURT: You see you've already won part.

14:44:06 21 MS. MACKIN: I just wanted to flag a couple of
14:44:09 22 additional things for the Court's consideration.

14:44:13 23 What I think can sometimes get lost in this body of law
14:44:17 24 is the idea that this is not just a one-way ratchet. It's not
14:44:24 25 just a dichotomy between purely private speech where you can say

14:44:29 1 pretty much anything you want and --

14:44:31 2 THE COURT: It's in the middle.

14:44:33 3 MS. MACKIN: And those are nuanced analyses. There's a

14:44:37 4 nonpublic forum analysis, which if the Court is disinclined to

14:44:42 5 conclude that this is government speech, at the very least,

14:44:46 6 because these exhibits are -- there's only two spots where you

14:44:51 7 can put them. They're not open to anybody for this type of

14:44:57 8 conduct that -- but it's actually subject to the nonpublic forum

14:45:01 9 analysis, which does allow for consideration of content but not

14:45:06 10 viewpoint.

14:45:09 11 So if it's not government speech, at the very least,

14:45:13 12 this is a nonpublic forum where we can exclude speech about

14:45:17 13 hitting cats in the head with sledgehammers or a speech that

14:45:21 14 appropriates sincerely held religious views and presents them in

14:45:26 15 a way that is offensive to some people.

14:45:34 16 THE COURT: Okay. You said something that can't be in

14:45:37 17 the papers and, of course, counsel haven't been able to go over

14:45:42 18 there. If you get a chance, you ought to go to the capitol.

14:45:46 19 It's really a beautiful building. That's not in the papers what

14:45:53 20 limited access the state gives to others. I happen to know

14:46:00 21 because I've lived here a long time.

14:46:03 22 And that's why it's very difficult in Rule 12 motions

14:46:08 23 created by the Supreme Court, which means that it takes three to

14:46:14 24 four months before you can get issue in these cases that they

14:46:20 25 have become semi-summary judgments. I don't want a summary

14:46:27 1 judgment. If I was going to put you to trial on this issue, it
14:46:32 2 would be in February of 2018. I'm booked until then. My docket
14:46:37 3 is full until then.

14:46:40 4 So I want y'all to proceed with summary judgments to
14:46:45 5 make the record however you wish it, and I'll -- I'm going to
14:46:59 6 give each of you 60 days to file motions for summary judgment and
14:47:04 7 30 days thereafter to respond, if you wish, to the other summary
14:47:14 8 judgments. And then, I will make a determination which you can
14:47:20 9 then take it to the Fifth Circuit and beyond. You know, I'm just
14:47:26 10 an elevator man. But I don't know that you need 60 days, but I
14:47:34 11 also know every time I give a lawyer 30 days, they ask for a
14:47:37 12 little bit more. So 60 is the limit.

14:47:40 13 Both of you file -- I'll give you an order on it. Both
14:47:44 14 of you file at a certain date and then, respond in 30 days, and
14:47:48 15 then, we'll get it up. The only substantive decision I'm going
14:47:55 16 to make is -- and I'll make it here so I'm not going to give you
14:47:58 17 an opinion on it. Just an order. I don't think there's any
14:48:02 18 question that Mr. Sneed under the pleadings is entitled to
14:48:07 19 qualified immunity.

14:48:09 20 And I thank you both for having patience and good
14:48:13 21 senses of humor. This unfortunately is so typical of a busy
14:48:19 22 court to have this kind of question come up. It's important. I
14:48:23 23 understand that. But it takes a lot of time away from the other
14:48:29 24 cases that are more traditionally litigation.

14:48:36 25 MS. MACKIN: Your Honor, if I just may ask.

14:48:37 1 THE COURT: Time that I just don't have. Yeah.

14:48:40 2 MS. MACKIN: We have a reply in support of a motion to

14:48:41 3 dismiss for which we obtained an extension and it was --

14:48:43 4 THE COURT: Just forget it.

14:48:45 5 MS. MACKIN: Okay.

14:48:46 6 THE COURT: Forget it. I'll promise not to read it if

14:48:48 7 you won't file it.

14:48:50 8 MS. MACKIN: We're agreed.

14:48:52 9 THE COURT: Okay. I'm in recess.

10 (End of proceedings.)

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4 UNITED STATES DISTRICT COURT)

5 WESTERN DISTRICT OF TEXAS)

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